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FEDERAL COMMUNICATIONS COMMISSION
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September 1, 2000

Via Hand Delivery

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Amendment of Section 73.658(g) of the Commission's
Rules -- The Dual Network Rule, MM Docket No. 00-108

Dear Ms. Salas:

Enclosed please find for filing an original and five (5) copies of the Comments of Fox Television Stations, Inc. in the above-captioned proceeding. Per the Commission's instructions, diskette copies of the comments are being sent to Wanda Hardy and International Transcription Service ("ITS").

Please date stamp this letter and the copy provided and return it to the messenger. Should you have any questions regarding the enclosed, please contact the undersigned.

Respectfully submitted,



Christopher J. Harvie

Enclosures

cc: Service List
Wanda Hardy
International Transcription Service

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

SEP 1 2000

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)
)
Amendment of Section 73.658(g) of the)
Commission's Rules -- The Dual Network Rule.)

MM Docket No. 00-108

COMMENTS OF FOX TELEVISION STATIONS, INC.

Fox Television Stations, Inc. ("Fox") hereby submits its comments to the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.^{1/} In the Notice, the Commission proposes to amend the dual network rule applicable to broadcast television stations to permit the purchase by one of the major networks (ABC, CBS, Fox, and NBC) of either the UPN or WB network. Consistent with its overriding view that the continued retention of the Commission's broadcast ownership restrictions -- such as the dual network rule, the national ownership cap, and the cable/television and newspaper/broadcast cross-ownership rules -- is both unnecessary and counterproductive, Fox supports the adoption of the amendment proposed in the Notice.

INTRODUCTION AND SUMMARY

Like several of the Commission's broadcast ownership rules, the dual network rule is rooted in, and responsive to, a model of the broadcasting marketplace that is over fifty years old. While the television marketplace has witnessed a proliferation of new outlets and undergone dramatic changes several times since then, rules designed to remedy putative ills from over a half-century ago remain in place. Whatever threat to competition and diversity perceived by

policymakers during the formative years of television when only three networks served as the chief distribution source for video programming, has long since been eviscerated by a wide array of new networks, stations, outlets and technologies.

The rapid and comprehensive success of newer technologies such as cable, direct broadcast satellite, and Internet service in penetrating and capturing large segments of the viewing and advertising markets has destroyed any remaining justification for the dual network rule and other broadcast ownership restrictions. Rather than being the only recourse for suppliers of television programming and purchasers of advertising time, broadcast television networks are now simply a few competitors among many. Failure by the FCC to fully accommodate this new reality will result in a continuing diminution in the quality and quantity of programming available via free broadcast television as both network and other investors increasingly shift their resources to more profitable subscriber services.

I. THE BREADTH AND VIGOR OF COMPETITION FACED TODAY BY BROADCAST TELEVISION NETWORKS RENDERS THE DUAL NETWORK RULE UNNECESSARY AND UNJUSTIFIABLE

The television landscape has changed dramatically since the promulgation of the dual network, national ownership, and other broadcast ownership rules imposed by the Commission. These rules have their roots in the early years of television, when three networks dominated the entire television market, few local stations were licensed, and alternative channels of distribution for television programming did not exist. As the industry has matured, numerous new competitors -- both broadcast and nonbroadcast -- have entered and attracted large portions of the market formerly controlled by the networks.

^{1/} *In the Matter of Amendment of Section 73.658(g) of the Commission's Rules -- The Dual Network Rule*, MM Docket No. 00-108, FCC 00-213 (released June 20, 2000) (Notice).

When the dual network rule was first adopted in the 1940s, broadcasters were the sole source of television programming for American households. Today, 81 percent of the nation's homes receive their television programming from a cable operator, direct broadcast satellite (DBS) provider, or other multichannel video programming distributor (MVPD).^{2/} Cable is almost universally available, and at least 67 percent of American homes subscribe.^{3/} In addition, direct broadcast satellite services are universally available and offer up to 350 channels to more than 10 million households.^{4/} More than 170 national and 50 regional cable networks supply programming to MVPDs.^{5/} Fifteen cable networks reach at least 70 million American households.^{6/} In the near future, video streaming over the Internet and digital broadcast television will further expand the television choices available to millions of American households.

For the less than two out of ten American households dependent upon over-the-air broadcasting as their sole source of video programming, the television marketplace also is far different than it was when the dual network rule was adopted. The number of individual broadcast networks has more than doubled to seven national broadcast networks, as well as other more specialized networks. The average American household can receive 13 over-the-air

^{2/} *In the Matter of Annual Assessment of Competition in the Markets for the Delivery of Video Programming, Sixth Annual Report*, CS Docket No. 99-230, FCC 99-418 (released Jan. 14, 2000) ("Sixth Annual Report"), at ¶ 6.

^{3/} *Sixth Annual Report* at ¶¶ 19-20.

^{4/} *Biennial Review Report*, MM Docket No. 98-35, FCC-191 (released June 20, 2000) ("2000 Biennial Review") at ¶ 11.

^{5/} *Id.* at ¶ 10.

^{6/} *Sixth Annual Report* at Table D-6.

stations, while 36 percent can receive 15 or more stations and 9 percent can receive 20 or more.^{7/} Networks compete vigorously with each other and with independent local over-the-air stations for both viewers and advertisers.

The impact of these new alternatives on the market share of the networks has been both significant and obvious. The major networks' collective ratings (including Fox, a relatively recent newcomer) since the 1997-98 season have been significantly less than half what they were when the rules were promulgated.^{8/} Declines in audience share are expected to continue, with projected losses of an additional 14 percent of the market during the period from 1999-2003.^{9/} Cable is expected to overtake the major networks in audience share for prime-time viewing by 2001.^{10/}

Likewise, the broadcast networks' share of overall television advertising revenue has declined or remained essentially flat every year for the last twenty years, dropping from 44 percent in 1980 to 27 percent in 1999.^{11/} With respect to total advertising dollars (including cable, radio, print media, yellow pages), broadcast network advertising revenue was the only one

^{7/} 2000 Biennial Review at ¶ 9.

^{8/} Paul Kagan Associates, *The Economics of TV Programming and Syndication*, 1999, at 11, 21-22.

^{9/} *Notebooks*, Television Digest, Vol. 39, Issue 16 (April 19, 1999) (citing a study by the Yankee Group).

^{10/} *News*, Electronic Media, Vol. 18, No. 47 (Nov. 22, 1999) (citing study by Veronis Suhler & Associates); *Notebooks*, Television Digest, Vol. 39, Issue 16 (April 19, 1999) (citing a study by the Yankee Group).

^{11/} *Trends in Television, Television Advertising Volume*, <http://www.tvb.org/tvfacts/trends/tv/advolume.html>.

of out of twenty categories of advertising revenue to decline in 1997.^{12/} While broadcast network advertising revenue did increase modestly in 1998 and 1999, advertising revenue growth is rising far more sharply for other media outlets. In 1999, when total advertising revenues rose 6.8 percent, broadcast network revenues increased only 1.6 percent.^{13/} Meanwhile, cable network advertising revenues climbed 25 percent in 1999, while Internet advertising enjoyed an 85 percent increase.^{14/}

Given the increase in competition and the decline in viewership and share of advertising revenue faced by broadcast networks, there is simply no basis for retaining ownership restrictions. Clearly, the original concerns that may have warranted the imposition of the rule no longer prevail.^{15/} Thus, the proposed modification to the dual network rule set forth in the Notice is unquestionably warranted but, in Fox's view, does not go far enough.

While recognizing that the dramatic increase in competing distributors described above justifies some relaxation of the regulatory restrictions on broadcast ownership,^{16/} the Notice

^{12/} *Trends in Advertising Volume*, Estimated Annual U.S. Advertising Expenditures, 1995-97, http://www.tvb.org/tvfacts/trends/advolume/1995_1997.html.

^{13/} *Trends in Advertising Volume*, Estimated Annual U.S. Advertising Expenditures 1998-1999, http://www.tvb.org/tvfacts/trends/advolume/1998_1999.html.

^{14/} *Id.*

^{15/} *See Report on Chain Broadcasting*, 6 Fed. Reg. at 2882, 1941 Lexis *2, 119-20 (May 1941) (noting need for dual network rule due to limitations on the number of distributive outlets caused by spectrum scarcity). *See also Amendment of Section 73.35555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Report and Order*, 49 Fed. Reg. 31877, 31878 (Aug. 1984) (Noting that restrictions on broadcast ownership were based "on traditional scarcity arguments -- that broadcast stations were sufficiently limited in number that regulation was necessary to eliminate the possibility of monopolistic control, and that limited frequencies as compared to the numerous applicants justified restrictions on ownership").

^{16/} *Notice* at ¶¶ 24-27.

limits the scope of that conclusion by reaffirming the FCC's position that major networks constitute a bottleneck because of spectrum limitations. In light of the existence of abundant channels for programming distribution that do not rely on the availability of spectrum, the Notice's suggestion that a bottleneck still exists because spectrum is limited misses the point.^{17/} The amount of television programming available is no longer constrained by the amount of spectrum available and any regulation failing to fully acknowledge that fact distorts the market and injures consumers.

The Notice errs by suggesting that the retention of some ownership restrictions on the top four broadcast networks may be warranted because they constitute a "strategic group" or "oligopoly" that possess characteristics and pursue objectives that are somehow materially distinct from other television programming providers.^{18/} All providers of television programming, and not just the broadcast networks, "are in the business of producing audiences."^{19/} It is fallacious to view the broadcast networks as a distinct oligopoly, since they face competition from a plethora of non-broadcast entities that are engaged in the same pursuit of attempting to find the most cost-effective means to attract the largest possible television audience. The notion that broadcast television networks are the only entities capable of producing a mass audience is belied by the fact that 15 cable networks reach at least 70 percent of the nation's homes.^{20/} Similarly, the Commission errs by suggesting that mobility barriers

^{17/} *Id.* at ¶¶ 21-25.

^{18/} *See id.* at ¶ 22 & n. 25, ¶ 23.

^{19/} *See id.* at ¶ 10.

^{20/} *See id.* at ¶ 22; *Sixth Annual Report* at Table D-6.

inhibit the development of new networks.^{21/} After remaining stagnant for upwards of forty years, the number of national television broadcast networks has more than doubled in just a little over a decade while the number of national cable networks has nearly tripled during that same time.^{22/}

The truth is that there have never been more substitutes for broadcast network television than exist now. No valid economic basis exists to analyze the effect of these rules in the artificial isolation of a network submarket.^{23/} Under such circumstances, retention of the dual network rule is unjustified.

II. THE DUAL NETWORK RULE HARMS CONSUMER WELFARE AND UNNECESSARILY CONSTRAINS EFFICIENT MARKET ARRANGEMENTS

As indicated above, the perceived market failure justifying the dual network and other broadcast ownership rules has vanished, but the regulations nonetheless remain. The perception of the broadcast industry as a discrete submarket to which unique rules must be applied to protect consumers has been rendered obsolete both by the proliferation of new programming distributors and networks and by a blurring of the old boundaries between cable, broadcast and online services. Any economic analysis regarding the effect of the dual network rule should focus only on the level of competition in the marketplace, rather than on the identity of a potential network buyer or seller. The question to be asked, therefore, is whether, apart from the broadcast

^{21/} *See id.*

^{22/} *See First Annual Report to Congress Assessing the Status of Competition in the Market for Cable Television and Other Video Programming Services*, 59 Fed. Reg. 64657-01 (Dec. 1994), ¶9 (noting the existence of 61 national cable programming networks); *2000 Biennial Review* at ¶10 (noting the existence of over 170 national cable programming networks).

^{23/} The FCC refused to apply such a limited analysis in its evaluation of the expansion of cable companies into other video programming markets. Its Sixth Annual Video Competition Report stated that “it was appropriate to compare the cable industry with other communications industry segments that currently provide, or plan to provide, such combinations of services.” *Sixth Annual Video Competition Market Report* at ¶12.

networks, do sufficient competitors exist to purchase television programming content and sell television advertising time to permit proper free-market functioning. In a market including hundreds of non-network broadcast stations, hundreds of national cable networks, and an array of new non-broadcast distributions mechanisms such as cable, direct satellite television, the Internet, wireless cable, SMATV, telephone company provision of video programming, video on demand, and personal video recorders, the answer must be a resounding yes.

While there is no market failure to be “remedied” by ownership restrictions like the dual network rule, the continuing enforcement of these obsolete rules is far from harmless. Such restrictions hinder the ability of the broadcast networks to enter into economically efficient arrangements that can promote consumer welfare by stimulating investment in new programming by network broadcasters. As the Notice recognizes, the current market environment renders it “imperative that networks obtain quality programming to stem audience erosion while dealing with [program] suppliers that now have expanded options for the sale of their product.”^{24/} In a nutshell, broadcast networks must confront upward pressure on the input costs they pay to program suppliers while at the same time facing a declining share of advertising revenue due to audience erosion. The resulting squeeze inevitably has an adverse affect on the broadcast networks’ ability to continue to invest in and provide high-quality programming, while spurring a disproportionate shift in investment to subscriber-based alternatives.

Traditionally, firms that face a contraction in their core revenue streams due to increased competition from new entrants and new substitutes look to offset those losses by finding new revenue streams. The dual network rule and the Commission’s other broadcast ownership restrictions, however, hinder the ability of the networks to pursue such strategies. The broadcast

^{24/} Notice at ¶ 14.

ownership restrictions have caused the networks to try to offset the decline in their core revenue stream by diversifying into other media. Thus, the broadcast ownership restrictions adversely affect consumer welfare by exacerbating the shift in new programming investment to subscriber-based alternatives, which can further decrease the quantity, quality, and diversity of the programming that the networks are able to offer. In short, by artificially diverting the flow of resources away from the free broadcast submarket to non-broadcast network outlets, the Commission's ownership rules actually exacerbate the perceived problems they are intended to solve: threats to the diversity, quality, and quantity of free broadcast programming.

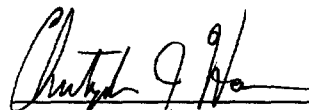
CONCLUSION

Fox agrees with the Notice's tentative conclusion that the proliferation of competitive distribution alternatives and existence of strong market efficiencies support modification of the dual network rule to permit the purchase of an emerging network by a major network. Further, Fox submits that these same factors justify the elimination or substantial modification of all of the Commission's restrictions on broadcast television ownership.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Comments of Fox Television Stations, Inc. was served this 1st day of September 2000 via hand delivery upon:

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